

BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

ALONZO H. DIAL)
Claimant)
v.)
CROWN SERVICES, INC.) Docket No. 1,069,484
Respondent)
and)
AMERICAN ZURICH INSURANCE CO.)
Insurance Carrier)

ORDER

Respondent and insurance carrier (respondent) request review of the November 5, 2015, Award by Administrative Law Judge (ALJ) William G. Belden. The Board heard oral argument on March 22, 2016.

APPEARANCES

Daniel L. Smith, of Overland Park, Kansas, appeared for claimant. Samantha Benjamin-House, of Kansas City, Kansas, appeared for respondent.

RECORD AND STIPULATIONS

The Board has considered the entire record and adopted the stipulations listed in the Award.

ISSUES

The ALJ found claimant met with personal injury by repetitive trauma to his left wrist and right elbow that arose out of and in the course of his employment.¹ The ALJ also held: claimant's work was the prevailing factor causing his repetitive injuries; claimant's permanent functional impairment totaled 12 percent to the whole body; and claimant sustained a 49.6 percent work disability, comprised of a 39.1 percent wage loss and a 60 percent task loss. Future and unauthorized medical were awarded.

¹ Although respondent denies compensability, the parties stipulated the date of injury was November 6, 2013. ALJ Award at 2.

Respondent contends claimant did not prove his repetitive trauma arose out of and in the course of his employment, and claimant's employment was not the prevailing factor causing his injuries. According to respondent, claimant's left arm symptoms developed after his employment with respondent ended. Respondent argues Dr. Pratt's 12 percent functional rating, and the doctor's opinions relevant to work disability, are based only on subjective complaints and are accordingly invalid. Respondent asserts claimant has no wage loss. Respondent maintains claimant is not entitled to unauthorized and future medical treatment, and that claimant was untruthful and misrepresented facts regarding his current employment, his symptoms and his medical history. Respondent urges the Board to overturn the ALJ's decision.

Claimant requests the Board increase his work disability award to 80 percent because a strict reading of K.S.A. 44-511(b) indicates that post-injury wages may include only earnings received from respondent, not from other sources. Claimant therefore reasons that since he no longer works for respondent, his wage loss is 100 percent, even though he works and earns wages for a different employer. Claimant requests the Board affirm the Award in all other respects.

The issues are:

1. Did claimant sustain personal injury by repetitive trauma to his left wrist and right elbow arising out of and in the course of his employment, including whether claimant's alleged repetitive trauma was the prevailing factor causing his injuries?
2. What is the nature and extent of claimant's disability?
3. Is claimant entitled to unauthorized and future medical?

FINDINGS OF FACT AND ANALYSIS

The findings of fact set forth in the Award are fully supported by a preponderance of the credible evidence, and those findings are hereby adopted by the Board and incorporated in this Order as though fully set forth, as supplemented below.

Claimant satisfied his burden to prove he sustained personal injury by a series of repetitive trauma arising out of and in the course of his employment with respondent, and his repetitive trauma was the prevailing factor causing his injuries, medical condition, disability and impairment.

Claimant described the physical requirements of his work and that testimony is undisputed.² Using both hands, he held pieces of metal and pressed them against a grinding wheel, causing vibration that extended into his hands and arms. He ground approximately 200-300 pieces during an eight hour day. After performing those duties for approximately two months, claimant developed pain and swelling in his hands, and difficulty gripping, that worsened as he continued to perform the his job. Claimant gave the medical providers consistent histories of how his injuries occurred, and there is no indication in the record claimant sustained any other accidents or injuries that would likely account for the development of his upper extremity symptoms.

Claimant's initial treating physicians at U.S. Healthworks found claimant sustained bilateral ulnar neuropathy in his hands. Claimant underwent an EMG on January 3, 2014, that revealed mild bilateral ulnar neuropathy.

Dr. Zimmerman found the prevailing cause for claimant's ulnar neuropathy and bilateral cubital tunnel syndrome was his work for respondent.

Dr. Pratt, the neutral examining physician, diagnosed mild left sided ulnar nerve entrapment near the wrist and mild ulnar nerve entrapment near the right elbow. Dr. Pratt opined, based on his understanding of the requirements of claimant's work, his duties were the prevailing factor causing his bilateral ulnar neuropathy and resulting impairment.

Dr. Guinn was not specifically asked to address causation and he arrived at no definitive diagnosis, but, in his judgment, whatever was wrong with claimant must have been caused by something occurring between the two EMG³ scans. Dr. Guinn did not state precisely what that something was.

Dr. Storm admitted he did not consider whether claimant sustained bilateral ulnar neuropathy,⁴ but the doctor seemed certain claimant's symptoms could not be work related. Dr. Storm, however, found enough wrong with claimant to administer bilateral injections, to conclude claimant sustained permanent impairment to both upper extremities, and to recommend claimant be referred to other specialists for further treatment.

The Board disagrees with respondent's contention claimant's injuries were not caused by his work because his symptoms developed after his work for respondent ended,

² Uncontroverted evidence that is not improbable or unreasonable cannot be disregarded unless it is shown to be untrustworthy, and is ordinarily regarded as conclusive. *Demars v. Rickel Manufacturing Corporation*, 223 Kan. 374, 573 P.2d 1036 (1978).

³ Claimant underwent a second EMG on September 25, 2014, that revealed evidence of ulnar nerve compression at claimant's left wrist and right arm. Zimmerman Depo., Ex. 5 at 2.

⁴ Storm Depo. at 31.

and were caused by claimant's post-injury employment. The evidence simply does not support that contention. Claimant began working for Discount Detail in April 2014. His job required washing and delivering vehicles and performing office work. Four physicians testified in this claim, but none of them opined claimant's injuries were caused by his work at Discount Detail. Claimant consistently claimed he had bilateral upper extremity symptoms from the inception of his claim and thereafter.

The Board agrees with the ALJ that the opinions of Dr. Pratt, the court-appointed neutral doctor, are entitled to substantial weight. Dr. Pratt's testimony, along with the testimony of claimant and Dr. Zimmerman, support the ALJ's determination that claimant proved he sustained personal injury by repetitive trauma arising out of and in the course of his employment, and such work was the prevailing factor causing his injuries, medical condition and impairment and disability. The Board further concludes the repetitive nature of claimant's injuries was demonstrated by diagnostic and clinical testing, and claimant's employment with respondent exposed him to an increased risk or hazard of injury which claimant would not have been exposed in normal non-employment life.

The Board notes the ALJ, who had the opportunity to see and hear claimant testify, specifically found claimant's testimony was credible.⁵ As the Court of Appeals noted in *De La Luz-Guzman-Lepe*,⁶ appellate courts are ill-suited to assess credibility determinations based in part on a witness' appearance and demeanor in front of the fact finder. "One of the reasons that appellate courts do not assess witness credibility from the cold record is that the ability to observe the declarant is an important factor in determining whether he or she is being truthful."⁷ Although the Board conducts a de novo review⁸ and is not bound by the ALJ's findings, including credibility determinations, under the circumstances of this claim, the Board provides some deference to the ALJ's credibility determination.

The Board agrees with the ALJ's holdings regarding claimant's impairment and work disability. The opinions of Dr. Pratt are the most credible and persuasive regarding both claimant's permanent impairment of function resulting from his injuries and the task loss claimant sustained. Hence, claimant's permanent functional impairment is 12 percent to the whole body and his task loss is 60 percent.

Claimant engaged in work following his departure from respondent. That job is described in detail by both claimant and Mr. Kamugisha, the owner of the business.

⁵ ALJ Award at 9.

⁶ *De La Luz-Guzman-Lepe v. National Beef Packing Company*, No. 103,869, 2011 WL 1878130 (Kansas Court of Appeals unpublished opinion filed May 6, 2011).

⁷ *State v. Scaife*, 286 Kan. 614, 624, 186 P.3d 755 (2008).

⁸ See *Helms v. Pendergast*, 21 Kan. App. 2d 303, 899 P.2d 501 (1995).

Claimant estimated he earns \$250 per week and Mr. Kamugisha, based on a spreadsheet he prepared, testified claimant's weekly earnings averaged \$245.45. The Board agrees with the ALJ that the evidence of claimant's post-injury average weekly earnings of \$245.45 is the most persuasive and reliable because it was based on documentation of claimant's actual earnings rather than only an estimate. The Board finds claimant's loss of wage earning capacity is 39.1 percent, computed by comparing \$245.45 with claimant's stipulated average weekly wage of \$403.28.

Respondent argues claimant's wage loss was not a result of his injuries, but was a consequence of claimant's choice to earn less. That contention, however, is not based on a preponderance of the credible evidence, and is speculative and conjectural. Claimant's testimony regarding the effects of his injuries on his employment status is unrefuted.

K.S.A. 2013 Supp. 44-510e(a)(2)(E) provides there shall be a presumption that when an employee is engaged in post-injury employment for wages, the average weekly wage amount the employee actually earns constitutes the wage the employee is capable of earning. That presumption may be overcome by competent evidence. Respondent relies on the testimony of vocational consultant Terry Cordray, who opined claimant was capable of earning \$9.00 per hour for a forty hour week, or \$360 per week. The Board finds respondent has not overcome the presumption by competent evidence. Mr. Cordray's opinion is speculative, and the most credible and persuasive evidence of claimant's wage earning capability is his actual post-injury earnings of \$245.45 weekly.

Claimant advances a novel position that in determining claimant's wage loss, only earnings claimant received by respondent may be considered, not earnings received from other sources. The only "other source" in this claim is claimant's earnings from Discount Detail. Claimant relies on provisions in the wage statute, K.S.A. 44-511. However, claimant cites no case law, or other authority, to support the notion that, despite claimant's current earnings of \$245.45 per week, he has a 100 percent wage loss. The Board cannot find authority lending credence to claimant's argument. The Board declines to construe K.S.A. 2014 Supp. 44-510e(a)(2)(E) in the manner suggested by claimant, which is inconsistent with the wording of the statute and would not advance the purposes for which those provisions were enacted. One legislative purpose was to alter the "wage loss" prong of the work disability equation from actual post-injury wage loss to the assessment of a claimant's capability to earn wages, while recognizing a claimant's actual post-injury earnings reflect loss of wage earning capability. That presumption is rebuttable by competent evidence. But, claimant's argument is based on actual wage loss, which was repealed by the 2011 amendments to the Act.

For the reasons set forth on pages 12-13 of the Award, the Board rejects respondent's arguments regarding unauthorized and future medical, and concludes the ALJ correctly awarded unauthorized medical and future treatment as set forth in the Award.

CONCLUSIONS

1. Claimant sustained personal injury by repetitive trauma to his left wrist and right elbow that arose out of and in the course of his employment, and his repetitive trauma was the prevailing factor causing his injuries.

2. Claimant's sustained a 12 percent permanent impairment of function to the whole body and a work disability of 49.6 percent. He is entitled to permanent partial disability benefits based on his work disability.

3. Claimant is entitled to future medical treatment and unauthorized medical as set forth in the Award.

AWARD

WHEREFORE, it is the decision and of the Board that the Award of Administrative Law Judge William G. Belden dated November 5, 2015, is affirmed in all respects.

IT IS SO ORDERED.

Dated this _____ day of May, 2016.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

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Honorable William G. Belden, Administrative Law Judge